89-353

No. _____

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In The

Supreme Court of the United States

October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSE GARZA
(Counsel of Record)
NORMA V. CANTU
ALBERT H. KAUFFMAN
JUDITH A. SANDERS-CASTRO
GUADALUPE T. LUNA
Mexican American Legal
Defense & Educational Fund
140 E. Houston, Ste. 300
San Antonio, Texas 78205
(512) 224-5476

ANTONIA HERNANDEZ
E. RICHARD LARSON
Mexican American Legal
Defense & Educational Fund
634 S. Spring St., 11th Floor
Los Angeles, CA 90014
(213) 629-2512

Attorneys for Petitioners

August 28, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Although geographically insular Hispanic voters comprise 36% of the voting age population of Saguache County, Colorado, and although no Hispanic has ever been elected to office in a contested county-wide election, the Tenth Circuit held below that the County's at-large system of electing commissioners for the Saguache County governing board did not violate Section 2 of the Voting Rights Act because the Hispanic community was not politically cohesive, and because Anglo bloc voting did not necessarily defeat the Hispanics' preferred candidates. Two questions are presented.

1. May petitioners' unrebutted voting analyses proving statistically significant racially polarized voting in nine out of ten elections in which Hispanic candidates were opposed by Anglos, during the course of a decade, result in a holding of no political cohesion within the meaning of Section 2 of the Voting Rights Act based solely on the anecdotal testimony of one lay witness for respondents, contrary to this Court's teachings in *Thornburg v. Gingles*, and contrary to the teachings of all Courts of Appeals which have addressed this issue?

2. May petitioners' same unrebutted proof of statistically significant racial polarization, together with continual Hispanic electoral defeat, result in a holding under Section 2 of the Voting Rights Act that the Hispanics' preferred candidates were not necessarily defeated by Anglo bloc voting based solely on the election more than twenty years ago of three unopposed Hispanic candidates and on the election of Anglo Democrats, again contrary to this Court's teachings in *Thornburg v. Gingles*, and contrary to the teachings of all Courts of Appeals which have addressed similar issues?

LIST OF ALL PARTIES

JENNIE SANCHEZ, Plaintiff
STELLA SANCHEZ, Plaintiff
ADELINE SANCHEZ, Plaintiff
DORA TRUJILLO, Plaintiff
CHARLES JARAMILLO, Plaintiff
SAGUACHE COUNTY, COLORADO, Defendant
MARY MOORE, Defendant
HAROLD PONT FREEL, Defendant
KEITH EDWARDS, Defendant
CHUCK GRANT, Defendant
WILLIAM BOND, Defendant
CECIL HALL, Defendant
JOHN PRICE, Defendant
ROBERT FELMLEE, Defendant

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No. _____

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October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Jennie Sanchez, et al., pray that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, reported at 875 F.2d 1488 (10th Cir. 1989), is attached hereto as Appendix A, App. 1-20. The unreported oral opinion of the United States District

Court for the District of Colorado is attached hereto as Appendix B, App. 21-33.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Sec. 1973, Section 2 of the Voting Rights Act of 1965, as amended, provides:

> (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected

> to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. Sec. 1973b(f)(2), Section 4 of the Voting Rights Act of 1965, provides, in pertinent part:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

STATEMENT OF THE CASE

This case involves a challenge by Mexican American[1] voters of Saguache County, Colorado to the at-large election system used to elect commissioners for the Saguache County governing board. The case was filed under Section 2 of the Voting Rights Act, 42 U.S.C. Sec. 1973 (as amended). Jurisdiction was founded on 28 U.S.C. Secs. 1331, 1343 (3) and (4) and 1344 and 42 U.S.C. Sec. 1973.

Saguache County is a rural county in south-central Colorado. (App. 1) The County stretches over 3000 square miles and has a population of just under 4000 persons. (App. 1-2) Approximately 41% of the population and 36% of the voting age population is Mexican American. (App.

[1] "Mexican American" was used in the District Court to mean persons of Spanish origin. The term is used interchangeably with "Chicano", "Hispanic" and "Spanish-surnamed".

2) The Mexican American population is highly concentrated, primarily in the town of Center. (Tr. p. 30)[2] The District Court found the Mexican American community to be geographically insular and sufficiently concentrated to create a majority in a single member district. (App. 28).

The Saguache County governing board is composed of three commissioners, each of whom must reside in a distinct residency district. (App. 3) Elections, both for nomination in party primaries and for election in partisan general elections, are county-wide, at-large elections. (*Id.*) Elections are staggered, and each position is numbered. (Tr. pp. 271-72)

No Mexican American has won a contested election in a county-wide election in Saguache County. (App. 5) No Mexican American has ever won election to the Saguache County governing board. (App. 5) Three Mexican Americans won election to county-wide positions in uncontested, unopposed elections. (App. 5) Those elections occurred more than 20 years ago. (Pl.'s Exh. 34) Several Anglo Democrats have won election to county-wide positions and Anglo Democrats have won election to the Saguache County governing board. (App. 5)

Petitioners, statistical expert examined every election – ten elections – in which Mexican Americans were opposed by Anglos, between 1976 and 1986 in county-wide elections for which data was available. (Tr. pp. 280-81; App. 4) Two results were noted. First, Hispanics

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[2] "Tr. p." refers to Trial Transcript; "C.R." refers to Court Docket; "Pl.'s Exh." refers to Plaintiffs' Exhibits at trial; and "Def.'s Exh." refers to the Defendants' Exhibits at trial.

were politically cohesive, in that they generally vote as a bloc for the Hispanic candidate. (Tr. p. 289) Second, Anglos vote as a bloc and vote differently from Hispanics. (Tr. p. 298) The expert concluded that nine of the races were highly polarized and that Anglos voted as a bloc systematically to defeat Hispanic candidates. (App. 4) Respondents' expert, while not disputing that Mexican Americans voted as a bloc and differently from Anglos, attributed the polarization to political affiliation. (App. 4) The respondents also presented a Mexican American resident of Saguache County who opined that Mexican Americans were varied in their political thoughts and consisted of various politically distinct groups. (App. 11) Finally, one of the respondents, an Anglo Republican, testified he had received a great deal of support from Mexican American voters. (App. 4)

The District Court found a pervasive history of discrimination against Mexican Americans in Saguache County that continues to this date. (App. 22-23) Moreover, Mexican Americans continue to suffer from the effects of historical discrimination in the areas of education, employment and income. (Pl.'s Exhs. 15, 18 and 19; Tr. pp. 299-305)

The at-large election of County Commissioners in Saguache County was challenged in an action commenced by petitioners on March 27, 1985. (C.R. Plaintiff's Original Complaint) Trial was held from November 16, 1987 until November 20, 1987. On November 20, 1987 the District Court issued its bench ruling dismissing petitioners' complaint. Initially, the District Court ruled that a clear showing of historical discrimination against Hispanics, that continues to the present, was made. (App.

22-23) The District Court also acknowledged that petitioners, expert, Dr. Brischetto employed an appropriate statistical methodology and that Dr. Ellis, respondent's expert, used a flawed statistical methodology to analyze elections. (App. 23) However, the District Court focused on the election of three Anglo Democrats and the election of unopposed Hispanic candidates to hold that Anglos do not vote as a bloc to defeat minority preferred candidates (App. 24, 28).[3] The District Court also held, based on the testimony of county resident Gomez that Hispanics were divided into two or more groups, that Hispanics were not politically cohesive (App. 28).[4] Finally, the District Court found that Hispanics did not have less opportunity to participate in the political process explaining:

> Not with the power they've exerted, *not as close as they've come to electing commissioners*. They exert a lot of power.

(App. 28) (emphasis added).

The Tenth Circuit affirmed the legal conclusions of the District Court on May 30, 1989. (App. A)

REASONS FOR GRANTING THE WRIT

This Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), construed the intent of Congress for successfully maintaining an action pursuant to Section 2 of the Voting

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[3] The District Court concluded that Anglos vote as a bloc "in the area of Republican candidates." (App. 28)

[4] Yet, the District Court held that Hispanics "controlled" the Democratic Party. (App. 24)

Rights Act, 42 U.S.C. Sec. 1973 (as amended). According to *Thornburg*, in establishing a Section 2 violation, the key issue is whether a majority bloc vote usually defeats the "candidates supported by a politically cohesive, geographically insular minority group." 478 U.S. at 49. The Court noted that resolution of this issue requires the presence of three interrelated predicates:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . .Second, the minority group must be able to show that it is politically cohesive. . . .Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed, – usually to defeat the minority's preferred candidate.

Thornburg, 478 U.S. at 50-51 (footnotes and citations omitted).

The conditions, as set out by the Court for a successful Section 2 claim, are straightforward; and the United States Courts of Appeals have been consistent in their application of these standards.

I. Unrebutted, Statistically Significant, Temporal Proof of Racially Polarized Voting Cannot Result in a Holding of No Political Cohesion Within the Meaning of Section 2 of the Voting Rights Act Based Solely on Anecdotal Testimony of One Lay Witness, Given This Court's Decision in *Thornburg v. Gingles*, and Given the Decisions of All Courts of Appeals Other Than the Tenth Circuit's Decision Below.

The Supreme Court in *Thornburg* has provided guidance to lower courts about how to evaluate Section 2

claims. With regard to minority political cohesion, the Court focused on the importance of polarized voting. The Court has established that:

> A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim and, *consequently, establishes minority bloc voting within the context of Section 2.*

Thornburg, 478 U.S. at 56. (citation omitted) (emphasis added)[5] In *Thornburg* polarized voting and thus minority political cohesion was established through a statistical analysis of only black versus white candidate elections, using extreme case analysis and bivariate ecological regression analysis. *Thornburg*, 478 U.S. at 52-53. These techniques yielded data concerning the voting patterns of whites and blacks, including estimates of the percentages of members of each race who voted for black candidates. *Thornburg*, 478 U.S. at 53. The range of support from the black community for the black candidate was 71% to 92% in the primary and 87% to 96% in the general election. *Thornburg*, 478 U.S. at 59. This Court held that these levels of support *establish* minority political cohesion. *Thornburg*, 478 U.S. at 61.

Consistent with the Court's guidance the Courts of Appeals have focused on analysis of election results to judge the voting behavior of protected minority populations. As expressed recently by the United States Court of Appeals for the Fifth Circuit, "[minority cohesiveness] is

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[5] The Court of Appeals conveniently omitted the italicized portion of this crucial passage. (App. 12)

not an inquiry to be made prior to and apart from a study of polarized voting . . . *because the central focus is on voting patterns.*" *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (emphasis added), *cert. denied*, 57 U.S.L.W. 3841 (U.S. June 26, 1989). Uniformly, the courts have adhered to the principle that minority bloc voting establishes the minority community's cohesiveness. *Gomez v. Watsonville*, 863 F.2d 1407, 1425 (9th Cir. 1988) ("the issue of political cohesiveness is to be judged primarily on the basis of voting preferences expressed in actual elections"), *cert. denied*, 57 U.S.L.W. 3620 (U.S. March 20, 1989); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1555-1557 (11th Cir. 1987) ("Although no one statistical theory is appropriate for all vote dilution cases, the Eleventh Circuit has approved the form of statistical analysis [bivariate regression analysis] used by the plaintiffs in this case."); *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935-36 (4th Cir. 1987) ("The court should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidate – if so, there is the requisite minority cohesiveness"); *Buckanaga v. Sisseton Independent School District No. 54-4*, 804 F.2d 469, 473 (8th Cir. 1986) (The court applied *Thornburg's* guidance regarding the relationship between racially polarized voting and minority political cohesiveness).

Moreover, the Ninth Circuit specifically rejected as irrelevant differences of political opinion within the Hispanic community when voting patterns demonstrated that Hispanics voted together. *Gomez*, 863 F.2d at 1416. The courts have recognized the relevance of lay witness testimony to the issue of polarization. *See. e.g., Carrollton*

Branch of NAACP v. Stallings, 829 F.2d 1547, 1558 (11th Cir. 1987) (plaintiffs established racially polarized voting through regression analysis *and* the testimony of lay witnesses.) However, anecdotal testimony has never been given greater weight than analysis of election behavior in determining the existence of polarization.

In contrast, the Tenth Circuit here approved the dismissal of objective statistical data analyzing election results. Evidence presented by both petitioners and respondents showed Mexican Americans voted together. Yet, the Court of Appeals approved a holding of no cohesion based on the testimony of a single lay witness who stated that in his opinion the Hispanic community consisted of several politically distinct groups which often supported different candidates.

> There is no indication that the court found plaintiffs' statistical evidence of Hispanic political cohesion to be insignificant because it could be explained by party affiliation. Rather, the court found that Hispanics were not politically cohesive *based on the testimony of Mr. Gomez*, who stated that his involvement in Saguache County politics had led him to the conclusion that Hispanics in the county consisted of several politically distinct groups which often support different candidates.

(App. 11) (Emphasis Added). The testimony of this one lay witness was allowed to overcome uncontested statistical data showing that Hispanic candidates received support from the Hispanic community ranging between 66% and 100% and averaging 87.1%. Allowing the anecdotal testimony of one lay witness to overcome such compelling, objective, uncontested election analysis conflicts

with the holdings of this Supreme Court and of the Fourth, Fifth, Eighth, Ninth and Eleventh Circuit Courts of Appeals.

II. Unrebutted, Statistically Significant, Temporal Proof of Racially Polarized Voting Together With the Defeat of Every Mexican American Candidate to Run in Contested County-wide Elections Cannot Result in a Holding Under Section 2 of the Voting Rights Act That Hispanic Preferred Candidates Were Not Necessarily Defeated by Anglo Bloc Voting – Given This Court's Decision in *Thornburg v. Gingles* and the Decisions of All Courts of Appeals Except the Tenth Circuit Below – Based Solely on the Election Decades Ago of Several Unopposed Hispanic Candidates, and on the Election of Anglo Democrats.

This Court has also provided guidance for determining whether there exists an Anglo bloc vote that usually defeats minority preferred candidates. The Court recognized the primacy of polarized voting and the extent of minority group members' electoral success in a determination of minority vote dilution in a Section 2 claim. *Thornburg*, 478 U.S. at 48-49 n. 15. These factors form the basis for making a determination of whether minority group members are politically cohesive *and* whether the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Thornburg*, 478 U.S. at 48-51, 56-58. Moreover, the election of a few minority candidates, especially if running unopposed, will not negate the existence of racially polarized voting or the existence of an Anglo bloc vote that usually defeats minority preferred candidates. *Thornburg*, 478 U.S. at 51, 57. Finally, a pattern of racial bloc voting over

time is more probative than the results of a single election. *Thornburg*, 478 U.S. at 57. Thus, where elections are shown to be polarized, the fact that racially polarized voting does not occur in one individual election does not negate the existence of polarized voting or of an Anglo bloc vote that usually defeats minority candidates. *Id.*

The Courts of Appeals have consistently adhered to this Court's guidance, and sustained claims of Anglo bloc voting based on polarized voting and on the continual defeat of minority candidates. *Carrollton Branch*, 829 F.2d at 1559. *See also, Gomez*, 863 F.2d at 1417, where the Ninth Circuit similarly focused on the continual defeat, over time, of Hispanic candidates to show the existence of an Anglo bloc vote sufficiently large to usually defeat the minority vote plus Anglo crossover vote. In *Campos v. City of Baytown*, 840 F.2d at 1245, the Fifth Circuit accepted the proposition that the proper focus in determining whether an Anglo bloc vote usually defeats minority preferred candidates was races involving minority versus Anglo candidates. As the Fifth Circuit recognized in *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987), *cert. denied*, 57 U.S.L.W. 3841 (U.S. June 26, 1989), Anglo versus Anglo races became useful only in the absence of elections that offer voters the choice of supporting a viable minority candidate.

The petitioners' expert in this case examined ten county-wide races pitting a Mexican American candidate against an Anglo candidate. The following table shows the levels of bloc voting in those races:

Election	Candidate	r[6]	Signif. Level[7]	Slope[8]	Support for Hispanic Candidates By Non-Hisp. Voters	Support for Hispanic Candidates By Hisp. Voters
*1986 Gen. Election County Comm. D.3	Archuleta	.92	.0004	.67	26%	93%

[6] The correlation coefficient or Pearson "r" measures the relationship between variables being analyzed. In this case the "r" measures the relationship between the proportion of Spanish surnamed voters or registered voters and the proportion of votes received by the Hispanic candidate in each Saguache County voting precinct. An "r" of +1 or -1 shows a perfect correlation between the variables and 0 shows no correlation between the variables. An "r" of .5 or higher would show a strong correlation. (Tr. pp. 274-77)

[7] The "significance level" refers to the probability that the correlation coefficient calculated in a particular election could occur by chance. Here the significance levels ranged from one in a hundred to practically zero. (Tr. p. 285)

[8] The "slope" tells the severity of polarization. A perfect slope would be 1.0. Slopes of .5 and higher would indicate severe polarization when taken together with the respective correlation coefficients. (Tr. pp. 285-86)

Election	Candidate	r	Signif. Level	Slope	Support for Hispanic Candidates By Non-Hisp. Voters	By Hisp. Voters
*1986 Gen. Election County Treasurer	Grant	.92	.0002	.67	18%	85%
*1986 Demo. Primary Univ. Regent	Alvarado	.96	.0000	.72	23%	95%
*1982 Gen. Election County Comm. D.3	Abeyta	.83	.0032	.61	27%	88%
*1982 Gen. Election State House D.60	Marquez	.88	.0007	.54	22%	76%
*1982 Demo. Primary County Comm. D. 3	Abeyta/ Archuleta	.75	.0122	.35	55%	90%
1980 Gen. Election State House D. 60	Gonzalez	.84	.0049	.53	24%	66%

Election	Candidate	r	Signif. Level	Slope	Support for Hispanic Candidates By Non-Hisp. Voters	By Hisp. Voters
1976 Gen. Election State House D. 60	Gonzalez	.98	.0002	.80	15%	95%
1986 Gen. Election County Comm. D. 1	Sanchez	.95	.0011	.68	16%	83%
1976 Demo. Primary State House D. 60	Gonzalez	.91	.0043	.86	22%	100%

*Percent Spanish surnamed of actual voters (other analyses based on percent Spanish surnamed of registered persons.)

(Pl.'s Exh. 14) As the chart indicates, all but one election showed extremely high levels of polarization.

The level of support for the Hispanic candidate from the Anglo voters ranged from 22% to 55% in the primary elections and from 15% to 27% in the general elections. The comparative level in *Thornburg* ranged between 8% and 50% in the primaries and between 28% and 49% in general elections. *Thornburg*, 478 U.S. at 59.

The level of support for the Hispanic candidate from Hispanic voters ranged from 90% to 100% in the primary elections and from 66% to 95% in the general elections. The comparative level in *Thornburg* ranged between 71% and 92% in *most* primary races and between 87% and 96% in the general elections. *Thornburg*, 478 U.S at 59.

Here the correlation coefficients or "r's" ranged from a low of .75 to a high of .98. The coefficients in *Thornburg* ranged from a low of .70 to a high of .98. *Gingles v. Edmisten*, 590 F. Supp. 345, 368 n.30 (E.D.N.C. 1984) aff'd in relevant part, *Thornburg*, 478 U.S. 30 (1986).

Moreover, respondents' expert here concluded that his analysis "indicates that there is a statistically significant correlation between the votes cast for Hispanic candidates and the number of registered Hispanic voters." (Def.'s Exh. A., p.7)[9]

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[9] While the expert concluded that Anglos do vote for minority candidates and that their votes help to elect such candidates, when quizzed about the races *he* chose to review and the elections *he* analyzed, he admitted that in all such races involving a Mexican American candidate, the Mexican American candidate lost. (Tr. pp. 583-85)

The Tenth Circuit recognized that no Hispanic had ever been elected County Commissioner. (App. 3) Moreover, the Tenth Circuit understood that no Hispanic had ever won a county-wide contested election. (App. 5)[10] Yet, despite an overwhelming record of polarized voting, the Tenth Circuit misapplied *Thornburg* and its progeny and held that there did not exist an Anglo bloc sufficiently large to usually defeat minority preferred candidates because: (1) Anglo Democrats had won some elections;[11] and (2) Mexican American candidates had won

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[10] Between 1972 and 1986, 3 Mexican Americans had run and lost for County Commissioner. Between 1972 and 1986, 10 Mexican Americans had run and lost county-wide elections. (Pl.'s Exhs. 8, 10)

[11] The Court of Appeals incorrectly summarized the record on this point. The record does not provide evidence to show that the Mexican American community *sponsored* any of the Anglo candidates for County Commission deemed by the Court below to be candidates of choice of the Mexican American community. In fact the record reveals that the three Anglo Democrats, Mr. Allen, Mr. Willhite and Mr. Grant, who have won election as county commissioners were not candidates that offered voters the "choice of supporting a viable minority candidate." Mr. Allen was not supported by Saguache County Hispanics when the choice was between Mr. Allen and an Hispanic candidate. (Tr. p. 692) Moreover Mr. Allen did not run on Chicano issues. (Tr. p. 78) Mr. Willhite joined in attempts to defund the Head Start program over alleged Chicano political activity. (Tr. pp. 151-166 Pl.'s Exh. #38) Mr. Grant was not sought out to be a representative of the Chicano community and is not associated with the Chicano community (Tr. pp. 99-101, 255). In fact one of the primary campaign strategies employed by Mr. Grant was to disassociate himself from the Mexican American community. (Tr. p. 254)

unopposed elections for a county-wide position.' (App. 12-14) The Tenth Circuit thus expressly affirmed as a matter of law the District Court's discounting of the very evidence that this Court in *Thornburg* identified as probative on this Section 2 issue, and instead held to be more legally probative factors which this Court held to be irrelevant or barely relevant.

This legal analysis employed by the District Court and accepted by the Tenth Circuit wrongly construes Section 2 "to provide minority groups the ability to participate equally in the electoral process and to have the opportunity to elect representatives *only* if those candidates are white." *East Jefferson Coalition v. Jefferson Parish*, 691 F.Supp. 991, 1001 (E.D. La. 1988) (emphasis added by the court) (explaining the irrationality of focusing on white versus white candidate elections when black versus white candidate elections showed polarization); *See also, Thornburg*, 478 U.S. at 82-83 (White, J., concurring); 478 U.S. at 83-105 (O'Connor, J., concurring). Such a focus misapplies the standards under *Thornburg* and is in conflict with the holdings of the United States Courts of Appeals for the Fifth, Ninth and Eleventh Circuits.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit conflicts with every other Court of Appeals which has had occasion to review a vote dilution claim under Section 2 of the Voting Rights Act. The decision of the Court of Appeals for the Tenth Circuit also conflicts with the standards established by this Court and by Congress

when it amended the Voting Rights Act in 1982. Congress *did not* intend for a minority community that has been subjected to invidious and continuing racial and ethnic discrimination, that has suffered continual and consistent electoral defeat of its candidates, and that could elect its own candidates if given the opportunity, to be left with only the choice of Anglo candidates as representatives of their interests.

For the foregoing reasons, petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

JOSE GARZA
(Counsel of Record)
ANTONIA HERNANDEZ
E. RICHARD LARSON
NORMA V. CANTU
ALBERT H. KAUFFMAN
JUDITH A. SANDERS-CASTRO
GUADALUPE T. LUNA

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JENNIE SANCHEZ, STELLA SANCHEZ, ADELINE SANCHEZ, DORA TRUJILLO, and CHARLES JARAMILLO,

Plaintiffs-Appellants,

vs.

WILLIAM BOND, County Clerk and Recorder of Saguache County, Colorado, CECIL HALL, KEITH EDWARDS, CHUCK GRANT, Board of County Commissioners for Saguache County, JOHN PRICE, County Chairman of the Democratic Party for Saguache County and ROBERT FELMLEE, County Chairman of the Republican Party for Saguache County,

Defendants-Appellees.

No. 87-2860

(Filed May 30, 1989)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 85-Z-825)

Jose Garza, Mexican American Legal Defense and Education Fund, San Antonio, Texas; and Antonia Hernandez, Norma V. Cantu, Judith A. Sanders-Castro, and Albert H. Kauffman of MALDEF, San Antonio, Texas, with him on the brief, attorneys for plaintiffs-appellants.

S. Morris Lubow, Denver, Colorado; and Robert S. Crites, of Crites and Farish, Monte Vista, Colorado, with him on the brief, attorneys for defendants-appellees.

Before MOORE and ANDERSON, Circuit Judges, and BROWN,* District Judge.

BROWN, District Judge

This is an appeal of a vote dilution case. Plaintiffs-Appellants are voters from Saguache County, Colorado, who contend that the at-large election procedure used to elect county commissioners in Saguache County impermissibly dilutes Hispanic votes in violation of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. §1973. After hearing the evidence, the district court concluded that the plaintiffs had failed to prove a violation of §2 and entered judgment in favor of the defendants. We affirm.

Appellants raise two main arguments on appeal. First, they contend that the district court misinterpreted the Supreme Court's ruling in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), and, as a result, applied erroneous standards of law to the evidence. Second, appellants argue that the trial court's factual findings were clearly erroneous. In order to address these claims, we first review some of the evidence presented in the district court.

Saguache County consists of approximately 3,000 square miles in central Colorado. In 1980, the county had

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*The Honorable Wesley E. Brown, United States District Senior Judge for the District of Kansas, sitting by designation.

a total population of 3,935, of which 41% were Hispanics[1] and 57% were Anglos.[2] Census records indicate that 36% of the voting age population was Hispanic in 1980. Despite the number of Hispanics in the county, no Hispanic has ever been elected to the Saguache County Commission. Colorado state law requires the division of each county in Colorado into three compact districts for the purpose of electing a board of county commissioners. One commissioner from each district is elected by the voters of the whole county. Each commissioner must be a resident of the district he or she is elected to represent.

The plaintiffs presented several witnesses who testified as to the political situation in Saguache County. The witnesses testified that the community was racially polarized and that Hispanics were unable to elect candidates to office in county-wide races. Several of the plaintiffs' witnesses had been defeated in county elections and stated their opinion that their losses were due to bloc voting by Anglo voters.

Plaintiffs also presented the testimony of Dr. Robert Brischetto, an expert on voting patterns and election systems. Dr. Brischetto stated his opinion that Hispanics in Saguache County had less opportunity than Anglos to participate and to elect candidates of their preference. Dr. Brischetto concluded that this condition was due to the

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[1] "Hispanic" was used in the district court to mean persons of Spanish origin. The term was used interchangeably with the terms Mexican American, Chicano, and Spanish surnamed.

[2] "Anglo" refers to non-Hispanic whites.

at-large election procedure used in Saguache County elections. Dr. Brischetto's conclusion was based in large part upon a statistical study of selected political contests. He examined ten races in which Anglo and Hispanic candidates ran against each other. Using the voting results from each precinct, Dr. Brischetto compared the proportion of Hispanic voters in each precinct with the proportion of support received by the Hispanic candidate. He found a high correlation between the two, leading him to conclude that voting in nine of the races was "highly polarized." Dr. Brischetto stated that, in his opinion, whites voted as a bloc to systematically defeat Hispanic candidates. He also concluded that Hispanics were politically cohesive, noting that his study showed that Hispanics generally vote as a bloc for Hispanic candidates.

The defendants' expert gave his opinion that voting in Saguache County was polarized along party lines, suggesting that party affiliation was a better predictor of how a voter would vote than was the race of the voter. The defendants also presented testimony from lay witnesses, who stated that a majority of the Democratic party in Saguache County was made up of Hispanics and that Hispanics controlled the nominating process in the party. The witnesses also testified that an Anglo could not be nominated by the Democratic party without the approval of a group of Hispanics that included several of the plaintiffs. Additionally, the witnesses gave their opinion that Hispanics in Saguache County were not a single cohesive group but consisted of several politically distinct groups. One of the defendants, an Anglo county commissioner, testified that he received substantial Hispanic support in his election to the commission.

Results from county elections dating back to the 1970's were used by both sides in the trial court. Plaintiffs pointed out that no Hispanic had ever won a contested county-wide election and that three Hispanics had run for county commissioner and had been defeated. The defendants showed that a few unopposed Hispanics had won county-wide positions. The defendants also noted that Democratic candidates had been regularly elected to county positions, including the county commission.

I. *Section 2 and the Gingles requirements*

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f) (2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to partipation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered:

> *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The Supreme Court examined §2 in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Noting that amended §1973 repudiated the "intent test" of *Mobil* [sic] *v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), the *Gingles* court stated that the question §2 poses is whether, *as a result of* a challenged electoral practice, plaintiffs do not have an equal opportunity to participate in the electoral process and to elect candidates of their choice. The court found that the essence of a §2 claim is that a certain electoral practice interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and white voters to elect their preferred representatives. *Gingles*, 478 U.S. at 48.

In order to address a claim under §2, a court must assess the impact of the contested election practice on minority electoral opportunities by assessing certain objective factors. The Senate Report accompanying the 1982 amendment to §2 lists several factors that may be relevant to a §2 claim:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

Whether there is a significant lack of responsiveness on the part or elected officials to the particularized needs of the members of the minority group.

Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. Code Cong. & Ad. News 177, 206-07.

Several points should be kept in mind in applying the foregoing set of factors. First, the list is exemplary,

not exclusive. The court may consider any relevant factors in reaching its conclusion. Second. there is no requirement that any particular number of factors be proved or that a majority of them point one way or the other. Third, whether the political processes are "equally open" depends on a searching practical evaluation of the past and present reality and upon a functional view of the political process. *Gingles*, 478 U.S. at 46.

The Supreme Court noted several limitations on actions brought under §2. The court stated that election devices, such as at-large elections, may not be considered *per se* violative of §2. Also, the combination of an electoral mechanism and the lack of proportional representation alone does not establish a violation. And finally, the existence of racial bloc voting may not be assumed; plaintiffs must prove it. *Gingles*, 478 U.S. at 45-46.

In an attempt to give lower courts a framework for analyzing §2 claims, the Supreme Court set forth three "necessary preconditions" which must be present if plaintiffs are to prevail on their vote dilution claim. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. Second, the minority group must be able to show that it is politically cohesive. Third, the minority group must show that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. A white bloc vote that normally will defeat the combined strength of minority votes plus white "crossover" votes is said to be legally significant white bloc voting. *Id.* at 50-51. If these conditions are not present, then the challenged electoral practice cannot be considered as the

cause of the minority's inability to elect its preferred candidates. *Id.* at 50.

II. *The District Court's Findings*

The district court addressed the three "preconditions" of *Gingles* in its findings. The court found that Hispanics in Saguache County were sufficiently large and geographically compact to constitute a majority in a single district. The court went on to state, however, that Hispanics were not politically cohesive and that the plaintiffs had failed to demonstrate that whites voted sufficiently as a bloc to usually defeat the minority's preferred candidates.

The court found that Hispanics controlled the Democratic party in Saguache County and that Hispanics had a very strong say as to which candidates could run on the Democratic ticket. Based on this fact and on the testimony of the witnesses, the court found that several Anglo county commissioners had in fact been the preferred candidates of Hispanics. The court also observed that in two recent elections in which Hispanics had run for the county commission, the Hispanic candidate had lost by only 53 votes in one race and by 22 votes in the other. These close races, as well as the election of Anglo candidates preferred by Hispanics, indicated to the court that Hispanics have the ability to elect commissioners under the at-large system currently in use in the county. Considering all of the circumstances, the court concluded that plaintiffs had failed to meet their burden of proving that Hispanics in Saguache County have less opportunity to participate in the political process and to elect representatives of their choice.

III. *The Standards Applied by the District Court*

Appellants first contend that the district court applied an erroneous standard of law in its conclusion that Hispanics were not politically cohesive. Appellants argue that the test for political cohesion under §2 is whether the minority group generally votes as a bloc for the same candidates. Appellant believes that, contrary to the standards set forth in *Gingles*, the district court seized upon party affiliation to "explain away" the plaintiffs' evidence that Hispanics tend to vote for the same candidates.

It is clear from *Gingles* that a showing that a significant number of minority group members usually vote for the same candidates can establish the requisite political cohesiveness under §2. *Gingles*, 478 U.S. at 56. Furthermore, we agree with appellants that a court may not explain away evidence of racial bloc voting by finding that such voting is caused by underlying differences between the minority and white population. The reasons why minority voters may vote alike is unimportant in determining whether in fact the minority group votes as a bloc. Racially polarized voting, which indicates political cohesion, exists when there is a consistent relationship between the race of the voter and the way in which the voter votes or, in other words, where minority voters and white voters vote differently. *Id.* at 53, n.21.

In our view, however, the district court did not employ an erroneous standard in concluding that Saguache County Hispanics were not politically cohesive. As an initial matter, appellants overstate the district court's reliance on party affiliation as a factor in its

decision. The court briefly addressed the study of defendants' expert, Dr. Ellis, who sought to establish that party affiliation was the primary determinant of voter behavior in Saguache County. The court was critical of the methodology used by Dr. Ellis in his study, but tempered its criticism with the comment: "That doesn't mean that I give no weight to the analysis of Dr. Ellis, because I think what he has shown – and probably it's almost clear enough to be seen without any statistics – is that political party plays a very strong role in the results." (Tr. Vol. VII, p. 3). Appellants contend that this innocuous and undoubtably correct observation requires reversal. We disagree. There is no indication that the court found plaintiffs' statistical evidence of Hispanic political cohesion to be insignificant because it could be explained by party affiliation. Rather, the court found that Hispanics were not politically cohesive based on the testimony of Mr. Gomez, who stated that his involvement in Saguache County politics had led him to the conclusion that Hispanics in the county consisted of several politically distinct groups which often support different candidates. We find no support for appellants' contention that the court relied on party affiliation to explain away or rebut evidence of racially polarized voting.

Along this same line, appellants contend that the issue of political cohesiveness must be determined by examining only "objective" factors, such as a correlation and regression analysis of voting data, and not through the testimony of lay witnesses. Clearly, a statistical analysis of voting data is highly relevant to the issue of

political cohesion. *See e.g., Solomon v. Liberty County, Florida*, 865 F.2d 1566, 1574-78 (11th Cir. 1988). We find nothing in *Gingles*, however, to suggest that a trial court is *prohibited* from considering lay testimony in deciding whether a minority group is politically cohesive. *See Gingles*, 478 U.S. at 56 ("A showing that a significant number of minority group members usually vote for the same candidates is *one way* of proving . . . political cohesiveness. . . .") (emphasis added). *See also Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) (Plaintiffs established racially polarized voting through regression analysis and the testimony of lay witnesses.) The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive. This testimony would seem to be required if the court is to identify the presence or absence of distinctive minority group interests. Thus, we cannot conclude that the district court's consideration of lay testimony violated the standards of *Gingles*.

Appellants next argue that the district court considered improper factors in its finding that Anglos do not usually vote as a bloc to defeat minority preferred candidates. Appellants believe that the court erred because it considered the election of unopposed Hispanics to county office as evidence of Anglo support for Hispanics. It must be noted that *Gingles* cautions against attaching too much significance to the success of unopposed minority candidates: "[T]he success of a minority candidate in a particular election does not necessarily prove that the district

did not experience polarized voting in that election; special circumstances, such as the absence of an opponent . . . may explain minority electoral success in a polarized contest." *Id.* at 57. In the instant case, the trial court summarized the significance of the election of unopposed Hispanics as follows:

> There is also, I guess, an assumption in these considerations in the statistics that we should not – the court should not consider the races where an Hispanic is unopposed. But it would seem to me there is an equally important inference that if an Hispanic is unopposed, he is, indeed, supported by Anglos or he wouldn't be unopposed. It seems to me that inference is one which can be made.

(Tr. Vol. VII, p. 4)

The district court did not err in its consideration of unopposed candidates. *Gingles* clearly does not establish a *per se* rule against consideration of such evidence; it does caution against foreclosing claims on that basis alone. In this case, we cannot conclude that the district court gave undue weight to those races in which a Hispanic ran unopposed. The election of unopposed Hispanics was only one of several factors leading to the court's findings on vote dilution.

Appellants also contend that it was improper for the court to consider the election of three Anglo Democrats to the county commission as evidence of Hispanics' ability to elect candidates of their preference. Citing two Fifth Circuit decisions, appellants suggest that it is inappropriate to consider candidates who are not themselves minorities in determining whether racial bloc voting exists and in determining whether the minority group has been able

to elect candidates of their preference. This question is important in the present case because it is clear that the success of certain Anglo candidates played a significant part in the court's finding that vote dilution had not occurred.

The *Gingles* opinion offers little guidance on what significance the race of the candidates is to be given in assessing a §2 claim. In *Gingles*, the district court found that black voters had been denied equal opportunity to elect candidates of their preference. In reaching this finding, the district court considered only elections that pitted black candidates against white candidates. The Supreme Court affirmed but was divided on the importance of the race of the minority group's candidate. Four justices were of the view that "the race of the candidate *per se* is irrelevant to racial bloc voting analysis." *Id.* at 67. Under this view, only the *status* of the candidate as the chosen representative of a racial group is important. *Id.* A total of five justices, however, felt that such a hard and fast rule was contrary to precedent and was not necessary to the disposition of the case. *Id.* at 83, 101. This division on the Supreme Court prompted a difference of opinion among the circuit courts as well. At least one circuit has adopted Justice Brennan's view that the race of the candidate is irrelevant to voting analysis. *See Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987). In contrast, two Fifth Circuit cases have interpreted *Gingles* to mean that "the race of the candidate is in general of less significance than the race of the voter – but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1245

(5th Cir. 1988) petition for cert. filed, (citing *Citizens For A Better Gretna v. City of Gretna, La.*, 834 F.2d 496 (5th Cir. 1987), *rehearing denied* 849 F.2d 1471, petition for cert. filed. These cases suggest that the court should exclude from its analysis elections that do not include a candidate who is a minority. *Gretna*, 834 F.2d at 504 ("[I]mplicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate.") *But see Overton v. City of Austin*, 1989 U.S.App. Lexis 5927 (5th Cir. May 1, 1989) ("In the absence of further Supreme Court guidance, we do not criticize this methodology, although it is not the only permissible way to approach §2 claims.")

We do not believe that a *per se* rule against examining races that have only white candidates is implicit in *Gingles*. Such a rule would be clearly contrary to the plurality opinion, which views the race of the candidates as irrelevant in voting analysis. Moreover, such a rule is questionable in light of the language of §2, which seeks to give minorities equal opportunity to "elect representatives *of their choice*." 42 U.S.C. §1973(b). Nothing in the statute indicates that the chosen representative of a minority group must be a minority. Additionally, §2 requires that the district court make a determination from the totality of the circumstances, not from a selected set of circumstances. Accordingly, we conclude that there is no rule of law prohibiting the district court from examining those elections having only Anglo candidates. Such elections may be relevant and can be used to discern whether racially polarized voting exists and to measure the success of minority preferred candidates, so long as one of

the Anglo candidates can be considered a preferred candidate of the minority group. As with other types of relevant evidence, the district court has a right to consider these elections and to give them such weight as the circumstances warrant. Based on the facts of this case, we cannot conclude that the district court erred in considering races having only Anglo candidates.

IV. *Factual Findings*

Appellants next challenge the factual findings of the district court. In particular, appellants contest the findings that Hispanics were not politically cohesive, that Anglo Democrats had been chosen by the minority group, and the overall finding that Hispanic votes had not been diluted in violation of § 2.

We begin by noting that the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of factual findings, including the trial court's ultimate findings on vote dilution. *Gingles*, 478 U.S. at 79. The application of this standard "preserves the benefit of the trial court's particular familiarity with the indigenous political reality. . . ." *Id.* Furthermore, if the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Id.*

Applying the foregoing standard to the record in this case, we cannot say that the district court erred in finding that Hispanics were not politically cohesive. As an initial matter, the district court found the testimony of Mr. Gomez to be straightforward and believable. Mr. Gomez, who was familiar with the political situation in Saguache County, testified as to some of the differences among Hispanics in the county including the differing political objectives of various factions. *See Anderson, supra,* at 575 ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings.") He cited instances where Hispanics differed on which candidates to support. For example, he stated that Mr. Abeyta could have won his race for the county commission in 1982, except that members of Abeyta's own family worked against him.

Appellants assume that their statistical evidence conclusively showed political cohesion among Hispanics. Yet, the district court specifically found the plaintiffs' study to be inadequate because it did not consider Anglo candidates who were sponsored by Hispanics. Thus the trial court considered plaintiffs' statistics to be somewhat unreliable. Moreover, we note that of the ten races analyzed by plaintiffs' expert, four involved state representative elections covering a five-county area. The district court may have considered these elections to be of limited value in assessing whether voting for county commission seats was racially polarized. Of the six remaining races analyzed, only three were general elections for the Saguache County Commission. With this limited number of elections underlying the plaintiffs'

claim, together with the evidence suggesting that Hispanics were not politically cohesive, the trial court's finding that plaintiffs failed to meet their burden of proof is not clearly erroneous.

Similarly, the district court was not clearly erroneous in finding that three Anglo Democratic candidates were the chosen representatives of Hispanics. The district court found that Hispanics controlled the Democratic party in Saguache County, a finding that is not seriously challenged on appeal. That finding was supported by the evidence, which showed that Hispanics constituted a majority of the Democratic party and were very active in the political process. There was testimony to the effect that no candidate could secure the Democratic slot in county races without the support of a group of Hispanics that included some of the plaintiffs. There was testimony that Hispanics had chosen and supported Anglo candidates for the county commission. In light of these facts, we cannot conclude that the district court clearly erred in finding that Hispanics had been able to elect several county commissioners, even if the successful candidates were Anglos. Plaintiffs failed to explain how these candidates could obtain the nomination and support of the Democratic party if, as plaintiffs now contend, they were not the choice of Hispanics. Not only did these candidates receive substantial Hispanic support in terms of votes, but the evidence suggests that they were *chosen* by Hispanics in the first place. *Cf. White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) ("[T]he black community has been effectively excluded from participation in the Democratic primary selection process.") *See also Whitcomb v. Chavis*, 403 U.S. 124, 129, 91 S.Ct. 1858, 29

L.Ed.2d 363 (1971) ("We have discovered nothing in the record or the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.")

The foregoing factors support the trial court's finding that the electoral system used to elect Saguache County Commissioners does not violate § 2. The high level of Hispanic participation in the political process and the success of several Hispanic-supported candidates weighs heavily against a finding of vote dilution. Also, the plaintiffs' evidence in the district court was found to be lacking in several respects, including the failure of plaintiffs' expert to analyze all of the relevant elections. Although the lack of success of Hispanic candidates is a strong factor tending to show vote dilution, we cannot conclude that the district court clearly erred in finding otherwise. The court carefully considered the totality of the circumstances in this case and concluded that Hispanics have an equal opportunity to participate in the political process and to elect representatives of their choice. This determination is "peculiarly dependent upon the facts of each case." *Gingles*, 478 U.S. at 79. As the Supreme Court stated in *White v. Regester*, 412 U.S. at 769-70: "[W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . [electoral mechanism] in light of past and present reality, political and otherwise."

V. *Sufficiency of the Trial Court's Findings*

Appellants' final contention is that the trial court's findings, which were made from the bench, were not detailed enough to meet the requirements of Rule 52(a). Appellant cites several decisions emphasizing the need for detailed findings in vote dilution cases. *See e.g., Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984). Although the trial court's findings in this case could have been more detailed, the court made findings on all of the *Gingles* factors and disclosed the factual bases for its findings. This is sufficient to meet the requirements of Rule 52. *See Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871 (10th Cir. 1984), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2915, 91 L.Ed.2d 544 (1986). *See also McGruder v. Phillips County Election Commission*, 850 F.2d 406, 411 (8th Cir. 1988). Similarly, although written findings are preferable in this type of case, they are not required by Rule 52(a).

The judgment of the district court is AFFIRMED.

APPENDIX B

(p. 1) IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-Z-825

JENNIE SANCHEZ, et al.,

Plaintiffs,

vs.

SAGUACHE COUNTY, COLORADO, et al.,

Defendants.

REPORTER'S TRANSCRIPT

(Trial to Court: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 4:50 p.m., on the 20th day of November, 1987 in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

MANUEL J. SOLANO, Attorney at Law, 11990 Grant Place, No. 201, Northglenn, Colorado, 80233, and JOSE GARZA and JUDITH A. SANDERS-CASTRO, Attorneys at Law, Mexican American Legal Defense and Educational Fund, 314 East Commerce, Suite 200, San Antonio, Texas, 78205, appearing for the plaintiffs.

S. MORRIS LUBOW, Attorney at Law, 1775 Sherman Street, Suite 1700, Denver, Colorado, 81144, and ROBERT S. CRITES, JR.,

(p. 2) Attorney at Law, P.O. Box 430, Monte Vista, Colorado, 81144, appearing for the defendants.

* * *

PROCEEDINGS

THE COURT: I intend to give a bench opinion. I don't think anything would be gained by my taking this under advisement. About the only thing that would be gained is perhaps a more grammatical decision or one that isn't as disjointed as it may be if I give it from the bench; but I think that the facts in this case are very clear to me and the conclusion that I must reach is clear to me, and it doesn't make sense to keep everybody waiting.

There are many factors that have to be considered. This is not a case where some county or some state legislature is immediately enacting a particular device or scheme to affect the Hispanic voters. We were dealing with a statute that has been in effect for some time; and even though it is true that that statute may be in violation of the Voting Rights Act as – if it is applied to Saguache County, I think I need to say at the onset that what we're talking about very clearly is a statute which says that there has to be at large voting in every county under a certain population; and this statute applies to almost all the counties in Colorado, not just Saguache County.

In considering the testimony on historical (p. 3) discrimination, clearly there has been strong evidence of

historical discrimination against Hispanics which may very well continue to this day. I think the testimony of some of the witnesses, Mrs. Sanchez, Mr. Bobst, Ms. Wittevrongel, and the testimony in the deposition of Dr. Sandoval and his paper all pretty clearly show that there has been a lot of historical discrimination.

I guess the question is whether that historical discrimination hampers or really affects the political effectiveness as – of the Hispanics in Saguache County today, right now, at a time when I have to make a decision whether there is going to be at large voting in this county, as there is in all the other counties, or whether we're going to treat Saguache differently.

I do have to agree that the methodology used by Dr. Brischetto with the percentages, I think, is the correct methodology. And I think that was made clear in the – in this last indication, using the Republican votes or the Republican success. And I think there is problems with using the raw figures, which I suspect strongly that Dr. Ellis recognizes.

That doesn't mean that I give no weight to the analysis of Dr. Ellis, because I think what he has shown – and probably it's almost clear enough to be seen without any statistics – is that political party plays a very strong role in the results.

(p. 4) One problem I have with Dr. Brischetto's analysis is that he makes certain assumptions which may or may not be correct assumptions. The assumption, for example, that the Hispanics are the choice of the Hispanic voters, rather than considering, for example, the election of Mr. Grant, which seems to me by the testimony of

several witnesses, including Mrs. Grant, was the choice of the Hispanic voters, and who won. We didn't hear about Willhite. That was early on. But there has been some testimony that he was the choice of Hispanic voters, as well as – I forget the name of the other one. Allen. But it is clear that in Saguache County, different from some of these other cases, the Hispanics do control the Democratic party; and if they don't have an absolute decision on who runs as a Democrat for county commissioner, they certainly do have a very strong sayso in who is going to be – who is going to run.

There is also, I guess, an assumption in these considerations in the statistics that we should not – the Court should not consider the races where an Hispanic is unopposed. But it would seem to be there is an equally important inference that if an Hispanic is unopposed, he is, indeed, supported by Anglos, or he wouldn't be unopposed. It seems to me that inference is one which can be made. Mr. Edwards testified that he was supported by a number of Hispanics. He won by large majorities. Just in the facts of the votes, Mr. Edwards would (p. 5) have had to have been supported by a large portion of the Hispanic voters.

We have presented also to the Court a situation where in 1986, Mr. Archuleta lost the commissioner race by 22 votes. Had 12 people voted the other way, or had there been a few more of the registered voters that were drummed out by the Democratic party to go to the polls, or had there been a few more absentees, that vote would have gone the other way: Mr. Archuleta would have won. Mr. Freel would have lost. It was 22 votes. And with Mr. Abeyta, too, there were 53 votes that he lost by. Had there

been a very small group that had gone the other way, or a few more absentee votes, or a few more of the registered voters pulled out of their fields or kitchens to go to the poll, he would have won. And that shows that there is a very strong force, a very strong ability of the Hispanics in Saguache County to win these county commissioner races, even though – even though they lost in '86 by 22 votes and lost in '82 by 53 votes and won in '84, because I think the weight of the evidence is that Mr. Grant was the candidate of and supported by Hispanics, even though he may not have been Hispanic himself.

It's also very clear from the evidence, and the Court finds, that Mr. Edwards had to have Hispanic support to win by the majority of votes that he had.

We have testimony from Mr. Gomez which was really an eye-opener, which I suppose was difficult for all concerned, (p. 6) and which goes to one of the critical factors in the – in the elements that the Court must look to; and that is where whether the minority group is politically cohesive. And if Mr. Gomez is to be believed – and he appears to be a credible witness – he is saying that it is not a single cohesive group but two or more groups. Mr. Gomez appears to this court to be sincere that he wants Hispanic candidates to win. He indicated that he supported Mr. Sanchez, even though he ran against him in the primary – yeah, in the primary, and that he has supported and been very responsible for putting into power Hispanics in teaching positions, principals, and so forth, by his influence on the school board.

Something Mr. Gomez said really got to me. It made me wonder if it might not be true. I know that – that the

plaintiffs in this case are very sincere and they want that sure county commissioner race which they could have if this were not at large voting. I mean that's been shown to me, that it could be done. I think they can do it also the way it is, with at large voting. But what he said is that the Hispanics could put into office one or two or maybe even three over the next 10 years, if there is at large voting and if the vote isn't diluted. And he may be right, because these elections are extremely close. He may be right. And it may be that even though we've got very dedicated and sincere plaintiffs in this case and attorneys, I'm sure, that maybe that isn't the best, (p. 7) just from this un – hopefully unbiased viewpoint, up here on the bench.

In looking at both sides, maybe that really isn't the best thing to do from the point of view of what is best in the long run for the Hispanics in Saguache County. If, in fact, the at large scheme with their strong majority in the Democratic party and their ability to come so close in these races, 22 votes, 53 votes, and a win of Mr. Grant – if it stayed at large, they certainly could have one, two, or three county commissioners who were Hispanics, maybe getting out the vote a little more, getting a few more of the registered voters to the poll or a few more absentee votes.

So this court, I think, as all district courts, are very sensitive to any schemes, any plans, any statutes, anything which really dilutes votes, which really affects the ability of citizens to have their full, equal rights in the political process. And I'm very sympathetic to the policy expressed by the voting act, because I, I think, and I'm sure other judges who have decided these very difficult issues, are convinced that members of a protected class

must have equal opportunity to other members to participate in the political process. But this is an unusual case. This is a case where the protected citizens, the Hispanics, are very active in the political process. They control the Democratic party. They came very close to electing county commissioners. There have (p. 8) been elected Hispanics unopposed in the county. I think, if I'm not mistaken, there is an Hispanic county judge, although we haven't heard about the county judges. Mike Trujillo still a county judge?

DEFENDANT EDWARDS: Mike Trujillo.

MR. LUBOW: As far as we know, he is.

THE COURT: This is a case where Hispanics have a strong political party in Center, which is the largest city in Saguache County. They occupy most of the trustee seats, the mayor. We have Hispanics that have been elected to the school board. We have had Hispanics and associates, friends, who have asserted a lot of influence to hopefully improve the situation in Center, to get parts of the city annexed, to improve the school situation.

This Head Start thing, I think is a difficult situation. I have problems with that, because it seems that Head Start obviously is a very excellent program and should be strongly supported; and there is this problem that Mr. Edwards and some others have by feeling that it's too political.

But is this a case where the protected minority does not – has less opportunity to participate in the political process? I can't so find. I can't so find. Not with the

power they've exerted, not as close as they've come to electing commissioners. They exert a lot of power.

So even though the minority group has here (p. 9) demonstrated that it is large and geographically – could be geographically compact, if the at large voting would be discontinued elect a minority person – that is true. That, I can find. I cannot find that the minority group is politically cohesive. I think what we've got is two or more groups. Mr. Gomez, whatever these plaintiffs may feel about that, is a very sincere person, appears to be very strongly committed to electing Hispanics in the county. But also, as he says, he wants to elect – he wants to be free to make his choice on issues and candidates and to elect the person that he's – that's best for the county.

The third element that the white majority votes sufficiently as bloc to enable it to defeat minority preferred candidates has not been demonstrated. The majority certainly votes as a bloc in the area of Republican candidates, but what appears to me from listening to the experts is that we've got a 32 percent unaffiliated or independent group which mostly votes with the Republicans but swings back and forth between the Democrats and the Republicans. And we also have Hispanics among this unaffiliated group.

For all the reasons that I've stated, I have difficulty in finding that the plaintiffs in this case have met their burden of proof. This is not the outrageous case that we see in *Thornburg* or in some of the circuit court cases. This is a case in which Hispanics in Saguache County, yes, have been (p. 10) historically – have had – have faced

historical discrimination but have exerted a great deal of political power, have elected a lot of or have chosen a lot of Hispanics unopposed, have chosen a lot of Hispanics in Center, have had some of their candidates of choice elected as county commissioners, such as Mr. Grant and Mr. Willhite, have lost in such tight races that they could have won them very easily with their power, had they just – there had been just a few other votes the other way.

And that isn't the type of case that is addressed by section 1973. It doesn't meet the burden. And the Court is not going to fix something if it is not broken; and in this case, I am well assured after hearing the evidence that the Hispanic community will continue in their good efforts to do what they feel should be done in Center and in the county, and I have no question in my mind after hearing this case that the Hispanic group will continue to be very politically active and that it is just really a question of time before they do get a county commissioner who may be Spanish surnamed.

The judgment will be entered in this case in favor of the defendant and against the plaintiffs. I want to thank the attorneys, all of them. I want to thank the experts, also. It's been extremely well presented. It's been very interesting, and I've been sitting throughout this trial and wrestling with some of these issues, but I have to decide this as I truly feel it should be decided; and the plaintiffs have just not (p. 11) sustained the burden sufficiently.

I do want to thank the attorneys, and I wish both sides good luck; and if I could say anything that would have any influence, I would strongly urge – of course, you have the right to appeal it, and you may decide to

appeal it; but I would strongly urge, if even if you are going to appeal it, that the parties get their heads together, Mr. Edwards, Mr. Gomez, Mrs. Sanchez and some of the other group, and see if they can make some efforts to cooperate for the benefit of the county, rather than having the polarized positions that they have had in the past. I wish everybody good luck in trying to achieve what's best for Saguache County.

Exhibits will remain with the attorneys pending the appeal; and if the appellate court wants the exhibits, make sure you keep them in a safe place, because the court will call for the exhibits – the appellate court – and they'll have to come from the attorneys.

And Charlotte, if you could just have the attorneys sign that.

By the way, let me say one more thing. There has been no proof at all that even if the at large voting were to be changed that these districts would not – the present districts would not be districts that would result in a fair vote. I think I've not heard anything to tell me – and a couple times I think I asked for it – why the districts as they're presently (p. 12) constituted, the residency districts, would be unfair districts, if, in fact, there were to be a change in the at large provision. The way the evidence has gone, I see no reason to change or to make an exception for this one county, and therefore it's not relevant; but it would appear that the districts are compact, and I don't have any problems with them.

Chris, anything else?

My rulings and my findings of fact and conclusions of law which are stated on the record as though fully set forth – and I do not intend to – I don't think at this time I intend to do a written opinion – apply both to the voting rights case and the claims under the Fourteenth and Fifteenth Amendments. I'm not going to dismiss the Fourteenth and Fifteenth Amendment claims on any grounds owner the factual grounds that I've ruled on the with the voting rights – yeah, with the voting rights case.

The judgment will enter for dismissal of the case. In view of the particular circumstances and the closeness of the questions, I'm going to order that each side should pay his, her, or its own costs.

Anything further that you want on the record?

If anybody can think of any findings that they wish to have on the record for purposes of appeal, would you give me any proposed findings of facts that you're asking for within the next 10 days, and I'll decide whether I want to supplement (p. 13) the findings that I have on the record.

MR. CRITES: Your Honor, excuse me. I believe the statute provides for attorneys fees for the side which prevails.

THE COURT: Does it?

MR. CRITES: I believe that's required; and as to costs, I don't know that it applies to the court costs and the like.

THE COURT: Do you want to give me the citation of the section you're talking to?

MR. CRITES: It's 1983, the Federal statute.

THE COURT: I thought you're talking about 1973.

MR. GARZA: The citation is 19731(e) for the attorneys fees portion of the Voting Rights Act.

THE COURT: 1973 –

MR. GARZA: – 1(e).

THE COURT: Why don't I take a look at that; and if you have a motion for attorneys fees, would you present them within the next 10 days? I frankly didn't really take a close look at that, and I'll be happy to do it.

MR. GARZA: If I may, your Honor, the Court would have to find that the cause was frivolous in order to award attorneys fees.

THE COURT: There is no way I could find it's that.

MR. GARZA: Finding of – for grant of attorneys fees against plaintiffs, that's –

(p. 14) THE COURT: Well, under 1988, if I'm going – if there is any consideration of attorneys fees under 1988, that's how it goes, but I really haven't looked under this section.

MR. GARZA: The standard is the same, your Honor.

THE COURT: Pardon?

MR. GARZA: The standard is the same.

THE COURT: Is it the same as a 1988 standard?

MR. GARZA: Yes, your Honor.

THE COURT: Do you want to just take a quick look at it? File a motion, but don't do it if you're satisfied that it's only if it's frivolous. This is not a frivolous case.

MR. CRITES: No, it's not.

MR. LUBOW: We understand that from the comments of the Court.

THE COURT: Okay, Court is in recess.

(Thereupon, the trial was concluded and the Court recessed at 5:15 p.m.)

(p. 15) REPORTER'S CERTIFICATE

I, Paul A. Zuckerman, Registered Professional Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings described in this matter on the date set forth.

Dated at Denver, Colorado, this 11th day of December, 1987.

Paul A. Zuckerman, CSR, RPR